

## UTAH SCHOOL LAW UPDATE

Utah State Office of Education

October 2005

### **Closing Testing Loopholes**

As the stakes in Utah's standardized testing program rise, teachers, students and parents increasingly test the boundaries of state laws and rules regarding testing.

Some teachers, for example, are searching for testing protocol loopholes they can use to improve student performance.

The Professional Practices Advisory Commission continues to receive at least one or two referrals for protocol violations, and each has a slightly different twist.

One teacher, for instance, handed tests and answer sheets back to students to recheck their answers. She felt this did not violate testing protocol because she did not tell the students the correct answers.

But the effect of her actions is the same. Students received additional time to complete the tests and were told that their were incor-

rect answers on their tests.

For the school as a whole, the students who are given extra time gain an unfair advantage on the tests. Further, teachers who followed the letter and the spirit of the testing protocols are punished for

doing so while the teacher who cheated upped her students' scores.

And, as educators are learning, attempts to find "loopholes" in the protocols may lead to disciplinary actions against the educator's license. Where a teacher's actions harm students, discipline is likely, even if every possible violation is not explicitly spelled out.

On the student and parent end, districts and the State Office are already receiving requests for exemptions from the testing requirements.

Many of the requests are legitimate and the State Office continues to work with legislators to clarify its ability to make exceptions for students who, for various reasons, are unable to complete the UBSCT but are clearly competent in the subjects tested.

Some of the requests are truly extraordinary circumstances, such as the student who has missed every testing period because she is training for the Olympics and must travel out of state during the same months the UBSCT is administered.

The current rule addresses these kinds of extraordinary circumstances and allows districts the discretion to grant exemptions, but the State Board will also request that legislators grant it more leeway in the state law to handle unique situations in the future.

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#### **UPPAC CASES**

The Utah State Board of Education reinstated the license of Michael Thorpe Bennett. His license was suspended as a result of Mr. Bennett's conviction for attempted prescription fraud, a class A misdemeanor

The State Board reinstated the license of Edward A. Rawlings His license was previously suspended as a result of Mr. Rawlings accessing pornographic web sites on his school computer and storing pornographic videos in the ceiling of his classroom.

The State Board revoked the license of Paul E. Francis. Mr. Francis is charged with one count of sexual abuse of a minor. The minor was not a student of Mr. Francis. Additionally, a memory chip loaded with pornography on a district-owned IPOD was found in his possession.

#### **UPPAC Case of the Month**

In an Iowa case, a teacher made some farfetched arguments against the district's investigatory processes.

Some of the those same arguments have been made in Utah.

The case illustrates the courts' impatience with attorneys who would require that all investigations be conducted in the manner the teacher's at-

torney prefers.

In <u>Hlubek v. Pelecky</u> (2005), the Iowa Supreme Court ruled in favor of the school district on all issues. The case involved a drivers ed teacher who was accused of sexual harassment by a student.

The sophomore complained to the "area education agency," the equivalent of a school district. Two district personnel were assigned to investigate the matter.

The main investigator interviewed 12 students and the teacher. The second investigator also interviewed the teacher. In the course of the interviews, the investigators found support for the claims of the original complainant and evidence of other instances of inap-

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#### Eye On Legislation

Resolutions from the Utah State Legislature are typically viewed as accomplishing little more than enabling the sponsor to curry favor with a particular group without making any substantive changes in the law.

But some resolutions do have far reaching effect. For instance, any time a legislator wants to change the state Constitution, he or she must propose it as a resolution. This is due to the fact that the Legislature does not have the power to amend the state Constitution on its own, only the voters can do that.

Amidst the many resolutions that will be floated about the Legislature in the 2006 session is one such Constitutional amendment-one that should make the education community extremely nervous.

Titled "Resolution Eliminating Earmarking of Income Tax," the proposal seeks an amendment to the Utah Constitution eliminating the requirement that all income tax

be used for public and higher education—in other words, eliminating education's guaranteed source of funding.

If passed by the Legislature, the Constitutional amendment would be placed on the ballot in the 2006 November elections.

The tax reform committees that have spent the past several months searching for ways to revamp Utah's tax system promised from the start that there would be "no sacred cows."

However, throughout the discussions, sacred cows have been pretty well left alone, except for a few punitive suggestions, such as eliminating the sales tax exemption for newspapers and this resolution on income

Those familiar with the Legislature recog-

nize that it threatens to tax newspapers any time certain legislators feel maligned

> by the news, and we are all painfully aware of the Legislature's love-hate relationship with public education.

This latest resolution is one to start watching early and to speak to local legislators about often. Should the

Legislature proceed with this idea of eliminating the income tax portion of education funding, and Gov. Huntsman's pet project of eliminating the corporate franchise tax, without offering another reliable source of funding, public education in this state will be devastated.

The education community must hold legislators accountable to public education and ensure any tax reform efforts improve education, rather than undermine

#### **Recent Education Cases**

Calef v.Budden, (D.S.C. 2005): Courts continue to consistently define the lines of a teacher's First Amendment rights. In this case, a substitute teacher in a middle school sued claiming she was banned from substituting based on, what she asserted was, the lawful exercise of her First Amendment right to free speech.

The substitute made comments in class about the Iraq war, calling the president "stupid" and an

"idiot" and criticizing American military policy.

The court ruled that the school's interests outweighed the teacher's. School policy reasonably prohibited teachers,

including substitutes, from using abusive or derogatory or otherwise ernment class, but in a math disrespectful language in class.

Further, the district did not pro-

hibit Calef from subbing in other schools in the district, but had a

legitimate interest in excluding her from a school where she had "foisted her views on an impressionable captive audience." The teacher's cause was not helped by the fact that she expressed her political views,

not in a history or American Gov-

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#### **UPPAC** cases cont.

(Continued from page 1)

propriate conduct by the teacher. The teacher was also charged

criminally with assault but was acquitted.

Rather than pursue a hearing at the district, the teacher resigned. He claimed his resignation resulted from pressure by the investigators who threatened to turn the case over for licensing action.

The teacher then applied for two jobs, both of which he was denied based on background checks and

recommendations from the district. The teacher then sued the district claiming, among other things, that the investigation violated his rights

because the investigators were biased, students weren't interviewed in his presence, he was not allowed to cross-examine the students in the interviews, the investigator didn't have a child-psychology degree, the interviews weren't taped and the

statements of students were not taken under oath.

The court rejected each of these

arguments without hesitation. It found no requirements in the state law or laws regarding due process or other civil rights that would require any of the items the teacher cited as deficiencies in the process.

An investigation should be thorough and unbiased. But it need not be completed as if it were a hearing.

The court further rejected the teacher's assertions that any information the investigators gave in their recommendations to other school districts contained untruths.

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#### School Closures—The Utah Supreme Court Rules

The Utah Supreme Court has upheld the Salt Lake City School Board's decision to close two elementary schools.

For four years, the School Board deliberated over how to resolve the problem of declining enrollments on the east side of Salt Lake and increasing student populations on the west side. On June 19, 2001, and with much input from the public and press, the Board decided to close Lowell and Rosslyn Heights elementary schools.

Parents then sued, claiming the decision was arbitrary and capricious because the Board did not consider its own school

closure policy.

The parents argued that Board members did not have copies of the policy and some members admitted that they were unaware of the policy.

The Board argued that, though members did not review the policy, the factors that the policy required the Board to consider before deciding to close a school were all fully considered.

The trial court found that, though the Board members did not specifically reference the policy by name or number, all of the factors listed in the policy were thoroughly discussed and were "driving concerns in the decision-making process."

Further, the court recognized that

the policy did not dictate a result and the Board had full discretion to decide which of the competing factors was most important under the circumstances.

The Utah Supreme Court affirmed those findings, noting that "though the closure of one's neighborhood school is a sad event for those affected, that disappointment does not qualify a court to reevaluate an elected school board's decision unless that decision was truly without justification."

Failure to hand out the exact policy, while still considering all of the factors in the policy, is not a sufficient justification for overturning the School Board.

#### **Your Questions**

Q: Am I liable for anything if I don't intervene in a student fight?

A: Yes. Educators do not need to put themselves in danger, but they must do <u>something</u> to stop students from harming themselves or others.

This means that a 5'1" 100 pound educator does not have to step between two 6'0" 275 lb. students in a fist fight, but should do something, such as send other students for help or otherwise finding other adults who can intervene, while ensuring other students stay out of

What do you do when. . . ?

harm's way.

An educator who walks away or stays to watch but does nothing, on the other hand, may face personal liability for failing to protect students from a known harm. Courts understand when an educator tries to do something to protect students and it doesn't work out. Courts do not understand when an educator sees a student in danger and does nothing.

Q: May I take students out to lunch as a reward if my principal knows what I am doing?

A: Probably not. Most districts have very clear policies about taking students off campus and especially

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#### Recent Cases Cont.

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In Re S.W., (N.C. App. 2005): A deputy's search of a student in a school weight room was reasonable even without probable cause.

The deputy had reason to believe that the student possessed marijuana after smelling a "strong odor" of marijuana when the student walked by him.

The deputy asked two assistant principals to observe the search which consisted of a "pat down" of the student and asking the student to empty his pockets.

The court ruled that, as a full-time resource officer, the deputy was operating as a school official, not an outside investigator, and therefore need only satisfy the "reasonable suspicion" standard to conduct the

search. Had the deputy been acting as an outside investigator, he would have been held to the more stringent "probable cause" stan-

dard applied to law enforcement.

The court also ruled that the search was not overly intrusive given the limited nature of the search, the age of the student (high school) and the nature of the suspected offense (drug possession).

A word of caution: Other courts have reached inconsistent conclusions in similar cases. Schools should not rely on resource officers or police to conduct student searches without probable cause.

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Utah State Office of Education

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

#### Your Questions Cont.

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about driving students in the educator's personal car. These policies protect the educator, the students and the districts.

A student in a teacher's car with the permission of the principal is the district's responsibility. If the educator is in a fender bender, or a more serious accident, the district would be liable for the student and educator's medical bills.

If the student is in the car in violation of district policy and a fender bender or more serious accident occurs, the educator is liable for any medical bills that might

Further, in either situation, the educator should never be alone

result.

with a student in his or her personal vehicle. This protects the educator from false accusations about his or her conduct with the student, and protects students from educators who fail to maintain proper professional boundaries.

In the best interests of all involved, educators should strictly comply with district policies related to driving students and/or taking students off campus.

Q: On several occasions, I have walked into a colleague's classroom after school to find him looking at naked women, often en-

gaged in sexual activity, on his computer. What do I do?

A: Report the misconduct.

Educators are required to report violations of the rules of professional practices. An educator who is not the teacher's supervisor can report to the supervisor, the district HR personnel or UPPAC. A supervisor must report to UPPAC, and the district probably has a similar reporting requirement.

Failing to report known educator misconduct can result in discipline against the educator who has the duty to report.

Some may argue that such conduct, while ill-advised, is not harmful to students and could be handled through a warning by the building administrator. But Utah state courts recognize and have held that pornography is inappropriate in any workplace and constitutes sexual harassment.

More importantly, viewing pornography at school does place students at risk of inadvertently finding the images—a fairly common scenario—and places a black mark on educators at the school and the education profession as a whole.